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No. 83-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF [1]

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[1] Throughout this Reply Brief: "Pet." and "Pet. App." will respectively refer to the Petition for a Writ of Certiorari and appendix thereto; "Bd. Br." will refer to the Memorandum for the National Labor Relations Board; "ITT Br." will refer to the Brief in Opposition filed by respondent ITT.

ARGUMENT

1. Like Little Jack Horner pulling plums out of his Christmas pie, respondent ITT plucks facts out of the appellate decisions cited in the Petition, and states with self-satisfaction that because this or that fact is absent from the present case, there is no conflict among the circuits. (ITT Br. 18-21). If an exact "color-matching of cases"[2] were a precondition for a conflict among the circuits warranting the exercise of this Court's certiorari jurisdiction, few if any cases would qualify. In the final analysis, every case "turns on its own particular facts and circumstances" (ITT Br. 18). But those "facts and circumstances" must be evaluated according to some legal standard, and the outcome will often depend on what standard is chosen. So it is here, and so it was in the conflicting cases cited in the Petition. But precisely because this Court sits to resolve important questions of federal law, the question whether "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter"[3] depends on whether those decisions rest on conflicting rules of federal law. In that sense (which alone is material for present purposes) the decision below does conflict with those relied on at Pet. 7-11, because the latter decisions applied a significantly different legal standard in reviewing Labor Board certifications which were challenged on the ground of pro-union activity by supervisors. ITT cannot obscure its inability even to contend that the result of the present case would have been the same if the Second Circuit had applied the legal standard which prevails in other circuits.

The Labor Board also attempts to paper over the conflict of decisions.[4] The Board asserts that the courts in

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[2] *Cf. Reck v. Pate*, 367 U.S. 433, 442.

[3] U.S. Supreme Court Rule 17.1(a).

[4] Since the Board, though believing the decision below to have been wrong (Bd. Br. 5), has chosen to oppose review thereof, it is

the cases we cited "accepted the general principle applied by the Second Circuit here" (Bd. Br. 5). But the First and Fourth Circuit decisions which the Board cites (*id.*) did *not* accept the Second Circuit's "reasonably tended to have * * * a coercive effect * * *"[5] standard; rather those Courts required a much stronger showing before setting an election aside. See Pet. 7-8 quoting *Fall River Sav. Bank v. N.L.R.B.*, 649 F.2d 50 (C.A. 1) and Pet. 10, quoting *N.L.R.B. v. Manufacturer's Packaging Co., Inc.*, 645 F.2d 223 (C.A. 4).[6]

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fitting to recall what this Court said in rejecting the Board's contention that charging parties (such as the present petitioner) should not be permitted to intervene in enforcement proceedings:

> The Board also argues that the permitting intervention will adversely affect its tactical or budgetary decision not to bring a case here for review. But the opportunity is open to the Board to advise this Court whether a case that the intervening charging party brings here is an appropriate vehicle to raise important issues. And Congress has entrusted to this Court, rather than the Labor Board, discretionary jurisdiction to review cases decided by the Courts of Appeals. [*Auto Workers v. Scofield*, 382 U.S. 205, 221-222]

[5] Pet. Br. 5, quoting Pet. App. 15a.

[6] The Board's effort to pass off a conflict concerning legal standards as something less is exemplified by its denial that the First Circuit in *N.L.R.B. v. Northeastern University*, 707 F.2d 15 expressly noted a conflict with the Second Circuit's initial decision in the present case. (Bd. Br. 5-6, n.4). The pertinent passage in *Northeasern* is as follows:

> We have held, in related circumstances, that "without evidence of any threats, express or implied [the fact that supervisors favor a union] does not compel a finding of coercion." *Fall River Savings Bank v. NLRB*, 649 F.2d at 57. *But compare the Second Circuit's view in ITT Lighting Fixtures v. NLRB*, 658 F.2d [934] at 937. And, that holding governs here. [707 F.2d at 18, emphasis in original.]

Yet, in discussing this "holding" the Board says that "the comparison merely questions the result reached on the particular facts and does not reflect a different legal standard." (Bd. Br. 6, n.4).

We note also that the Board's reliance on a prior reference to *ITT* in the *Northeastern* opinion is misplaced. The court did not

Necessarily conceding that in the cases which we cited the courts "emphasized that the [supervisors'] conduct did not involve threats or promises" (Bd. Br. 6), the Board nevertheless says that these "courts did not hold that those were the only factors that were relevant to a determination of that question [but] considered all the circumstances, including the level of supervisory authority, to determine whether the supervisor's activity created the potential for future reprisal that would reasonably be likely to preclude employees from exercising a free choice in the election." (*Id.*). This, too, is incorrect: The Tenth Circuit, in a decision quoted at Pet. 9, but not cited by the Board, squarely held:

> Where supervisors exhibit pro-union activity and employees are aware of this, the election will be tainted only upon a showing of threats, either expressed or implied, that result in the employees' fear of retaliation. [*Worley Mills, Inc. v. N.L.R.B.*, 685 F.2d 362, 365 (C.A. 10)].

Since the court below set aside the election although there was no "showing of threats, express or implied" there is an unmistakable conflict of decisions between the Tenth and Second Circuits. Moreover, the existence of an intercircuit conflict is confirmed, rather than negated, by the *Fall River* and *San Antonio Portland Cement* cases cited at Bd. Br. 6. For while those decisions did give some weight to the "level of supervisory authority" (although considerably less than to the absence of threats or promises[7]) the Second Circuit here criticized the

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there approve *ITT* or state that it was in accord with the First Circuit's own decisions, but was merely setting forth "Northeastern's main argument." 707 F.2d at 17.

[7] In *Fall River* the Court said, on the page cited by the Board:

> [T]he Board could take into account the relatively limited power of the Managers as well (*far more importantly*) as the absence of threatening conduct, in refusing to set aside the

Board for distinguishing between "major" and "minor" supervisors (Pet. App. 7a), and neither respondent contends that the "more than minimal authority" (Pet. App. 8a) of the supervisors who supported the union here was greater than that of the supervisors in *Fall River*, *San Antonio Portland Cement*, or in any of the other cases which we have cited.[8]

2. While both respondents strain to deny the existence of an intercircuit conflict concerning the legal standard

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election on grounds of coercion. [649 F.2d at 57, emphasis added.]

In *San Antonio Portland Cement*, the Court said in the footnote cited by the Board:

> The Hearing Officer also found that New was a "low-level" supervisor, and that his authority extended only over a very insignificant number of total unit employees. [611 F.2d at 1152, n.2]

[8] Finally, the statement that "*nearly all* the cases cited by petitioner involved the isolated activities of only one or several supervisors, as opposed to the large number of pro-union supervisors involved here" (Bd. Br. 6, emphasis added), is both misleading and irrelevant. While the "large number of supervisors here" apparently refers to "the 15 group leaders whose status as supervisors is conceded" (Pet. App. 8a), only 5 did more than attend union meetings, which the court itself deemed insufficient. (*Id.*) Moreover, the Board's point is irrelevant because the court below did not rely on either the number of supervisors involved or of those who were active; rather, the court focused on the number of unit employees whom they supervised and the size of the union's margin of victory in the election (Pet. App. 9a). In this respect the decision below is apparently unique in assuming an adverse impact on all individuals who are supervised by a union supporter based on the latter's authority to reward them. Thus, for example, in one of the cases cited at Bd. Br. 6, *Northeastern University*, *supra*, the court did not even mention how many unit employees were supervised by the individual whose activities were challenged by the employer; indeed, it appears to have been all of them, since he was "the coordinator of [the] Transportation Department", which was the unit in individual whose activities were challenged by the employer, which the election was held. And the court gave no weight to the union's margin of victory; indeed, because the vote was 6-4, the union would have lost if one vote had changed. See 707 F.2d at 16-17.

for determining when an election should be set aside because of pro-union activity by supervisors, neither so much as mentions the glaring inconsistency between the standard applied by the court below and that which governs anti-union activity by supervisors. See Pet. 12-13. The existence of this double standard for review of election objections cannot be reconciled with § 7 of the National Labor Relations Act, which guarantees in equal terms the right of employees "to bargain collectively through representatives of their own choosing" and "to refrain from * * * such activit[y]."

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for Writ of Certiorari the petition should be granted.

Respectfully submitted,

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